

REVIEW OF THE GHANA-CÔTE D'IVOIRE MARITIME BORDER DISPUTE RULING: ROUND ONE

1. BACKGROUND

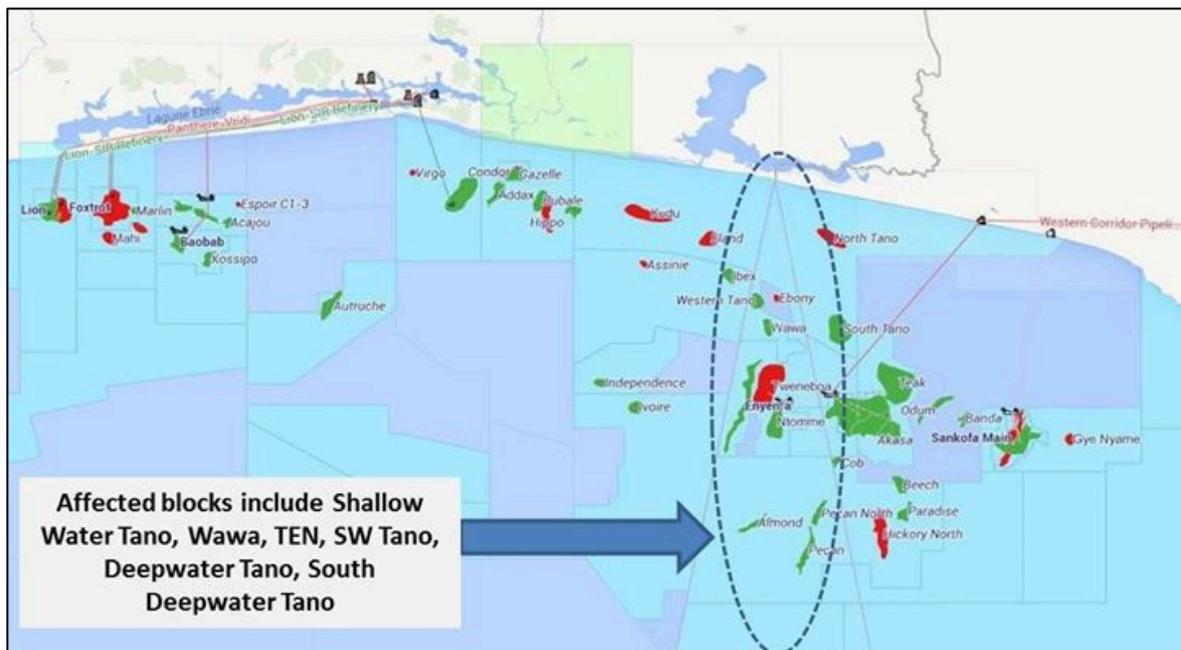
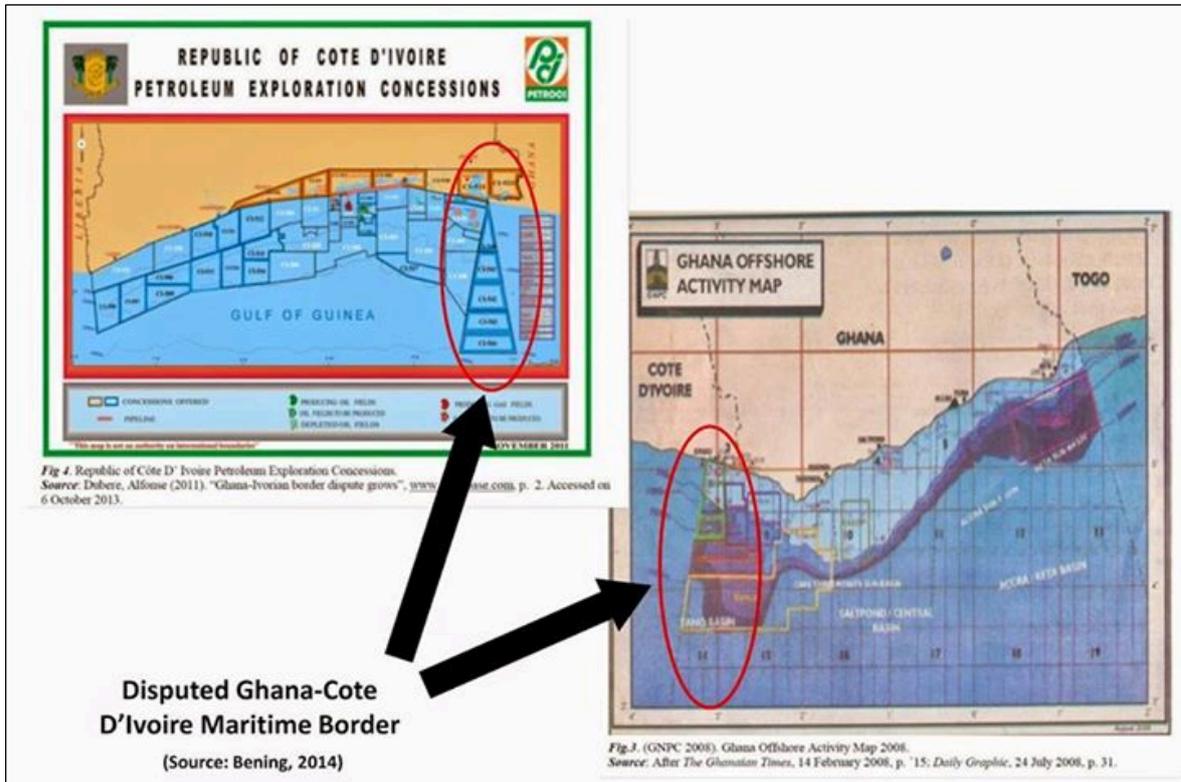
On 3 December 2014, Ghana and Côte d'Ivoire entered into a Special Agreement to submit their maritime border dispute to a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) following the breakdown of formal bilateral negotiations to resolve the impasse. Further on 27 February 2015, Côte d'Ivoire filed a request for the prescription of provisional measures to the Special Chamber requesting the ITLOS to grant temporary provisional measures for Ghana to suspend **all oil exploration and production activities** in the disputed maritime boundary pending the resolution of the full case in late 2017.

It is important to note that as far back as late 2008, just a year after Ghana's first ever commercial discovery of oil and gas resources, Professor Raymond Bagulo Bening of the Department of Geography of the University of Ghana, Legon, who is an authority on African boundaries, drew the attention of the Ghanaian authorities to the need to partition the eastern portion of the Tano Lagoon and to define the maritime boundary between Ghana and Côte d'Ivoire in view of the extensive oil exploration activities being carried out by both countries in their territorial seas (Bening, 2008).

However, it was not until Côte d'Ivoire raised the issue of the maritime boundary with the United Nations in 2010 that Ghana began to pay serious attention to the issue. It is also important to note that though land boundaries were generally delimited and demarcated during the colonial era, very little attention was paid to the determination of the maritime boundaries. Ghana argues that the common maritime boundary between the two countries, though not formally delimited, has been mutually recognized for decades in numerous ways such that both countries have carried out oil and gas exploration and production taking into account this 'gentleman's agreement'.

2. WHAT IS AT STAKE?

The disputed area (see charts below) covers portions of the TEN and the Deepwater Tano blocks in Ghana's territorial waters. Tullow, Kosmos, Vanco and others are exploring for commercial oil plays in this ultra-deepwater terrain. This disputed maritime area is estimated to hold about 2 billion barrels of oil reserves and 1.2 trillion cubic feet of natural gas. In April 2013, there were media reports that France's Total had struck oil on the CI-100 block off Côte d'Ivoire's maritime border and adjacent to Ghana's. The block lies in close proximity to the producing Jubilee field and the now being developed Tweneboa-Enyenra-Ntomme (TEN) fields.



Credit: Wood Mackenzie Upstream Data Tool

3. REQUESTS OF THE TWO PARTIES

In its request, Côte d'Ivoire asked the Special Chamber to prescribe, as **provisional measures**, that Ghana shall:

1. "Take all steps to suspend **all oil exploration and exploitation operations** under way in the disputed area;
2. Refrain from granting any new permit for oil exploration and exploitation in the disputed area;

3. Take all steps necessary to prevent information resulting from past, present or future exploration operations in the disputed area conducted by Ghana, or with its authorization, from being used in any way whatsoever to the detriment of Côte d'Ivoire;
4. And, generally, take all necessary steps to preserve the continental shelf, the waters super-adjacent to it, and its subsoil; and
5. Suspend, and refrain from, any unilateral activity entailing a risk of prejudice to the rights of Côte d'Ivoire and from any unilateral action which could lead to aggravating the dispute"

Ghana requested the Special Chamber to simply **“deny all of Côte d'Ivoire’s requests for provisional measures.”**

4. RULING OF THE SPECIAL CHAMBER

In its somewhat ‘maintaining-the-status-quo ruling’, the Special Chamber needed only to satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are **“at least plausible”** on the balance of probabilities.

The Court sought to safeguard the respective sovereign and economic rights^[1] of both countries which may be adjudged in its final Judgment based on the merits to belong to either Party. The court had in an earlier case made the point that it may not prescribe provisional measures unless it finds that there is **“a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute”**. As judge ad-hoc Thomas Mensah notes in his supplementary to the ruling, provisional measures have as their object “preservation of the respective rights of the parties in the case, pending the final decision on the merits”.

The Special Chamber ruled that Côte d'Ivoire had presented enough material to show that the rights it seeks to protect in the disputed area were plausible and that there exists a link between the rights Côte d'Ivoire claims and the provisional measures it sought. However, the Chamber dismissed Côte d'Ivoire’s claims of harm to the marine environment by saying they had not adduced enough evidence in support of it. Côte d'Ivoire gave Ghana the leeway by saying that it “does not necessarily mean that all activities in a disputed area are to be excluded, but such activities are lawful only if they do not imperil ... the judicial ... decision ultimately established”. Thus, *ex-post*, the argument is that Côte d'Ivoire would not materially suffer any losses should Ghana continue with current activities.

Ghana maintained that there would be serious financial implications and she **“would be severely harmed if the provisional measures requested by Côte d'Ivoire were ordered”** such that large swathes of the Deepwater Tano Concession Block, including the TEN fields, would be threatened with irreparable harm as development activities are in an advanced stage having already passed the 50% completion mark.

The Special Chamber was of the view that “the on-going **exploration and exploitation activities** conducted by Ghana in the disputed area will result in a modification of the physical characteristics of the continental shelf” to the extent that **irreparable prejudice** would have been done which cannot be fully compensated by financial reparations – i.e. Côte d'Ivoire will be irreversibly affected and can never be able to restore the *status quo ante* in respect of the seabed and subsoil.

The Special Chamber finally concluded thus:

“(1) Unanimously

Prescribes, pending the final decision, the following provisional measures under article 290, paragraph 1, of the Convention:

- a) Ghana shall take all necessary steps to ensure that **no new drilling** either by Ghana or under its control takes place in the disputed area as defined in paragraph 60^[2];
- b) Ghana shall take all necessary steps to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area that is not already in the public domain from being used in any way whatsoever to the detriment of Côte d'Ivoire;
- c) Ghana shall carry out strict and continuous monitoring of all activities undertaken by Ghana or with its authorization in the disputed area with a view to ensuring the prevention of serious harm to the marine environment;
- d) The Parties shall take all necessary steps to prevent serious harm to the marine environment, including the continental shelf and its superjacent waters, in the disputed area and shall cooperate to that end;
- e) The Parties shall pursue cooperation and refrain from any unilateral action that might lead to aggravating the dispute.

(2) Unanimously Decides that Ghana and Côte d'Ivoire shall each submit to the Special Chamber the initial report referred to in paragraph 105^[3] not later than **25 May 2015**, and authorizes the President of the Special Chamber, after that date, to request such information from the Parties as he may consider appropriate.

(3) Unanimously Decides that each Party shall bear its own costs.”

5. IMPLICATIONS AND ECONOMIC IMPACTS OF THE RULING

The ruling has certain implications for Ghana's emerging oil and gas industry even at the *prima facie* level, as the Court granted parts of the provisional measures sought by Côte d'Ivoire.

- a. Luckily, the TEN field, currently in the development phase with over US\$2bn already incurred by Tullow and other JV partners, will not have to be suspended for the two years period until the resolution of the case in 2017. In its trading statement and operational update of 15 January 2015, Tullow Oil reported that the important TEN development project is now over 50% complete and remains within budget and on-track to deliver first oil in mid-2016.
- b. In another separate report, Tullow announced that all **10 pre-first oil wells have been drilled ahead of schedule** and currently suspended in preparation for the completions to be installed by April 2016. In all 24 wells, including gas and/or water re-injection wells, are needed for full field development, but the Phase 1 development consisting of the 10 former wells would not be affected.
- c. The TEN project is of huge strategic importance to Ghana and any significant derailment of the project is time Ghana can ill-afford to waste. The TEN project together with Jubilee and Sankofa gas anchor Ghana's **medium term energy security goals** since gas from the field is expected to contribute significantly to thermal power generation as we wean ourselves of

supply from the ever unreliable West African Gas Pipeline (WAGP). It is estimated that production will be 30mmscfd of gas initially in 2017, will be ramped up later to 170mmscfd, but will plateau at about 80,000 bbls of oil per day. The country currently needs about 191mmscfd to power its thermal plants. This is projected by the Ministry of Energy to grow to 265 mmscfd in 2020 and 584 mmscfd by 2030.

- d. There is currently no contingency plan within Ghana's budgetary provisions to forestall the impact of curtailed production on public finances. In other words, Ghana and its partners have potentially averted the loss of about US\$2.2bn of revenues even at a conservative \$70 per barrel oil price had the Court ruled that production had to be stopped or curtailed. We do however need to have a backup plan and also estimate the impact of lost revenues on public finances post 2017 if the ruling then doesn't go our way.
- e. Petroleum receipts have become a critical source of government revenue, rising from 5.9% of domestic revenue in 2011 to 13.5% in 2014. Given Ghana's current fiscal and liquidity challenges, this has become a critical budgetary funding source.
- f. Further, a moratorium on oil production activities even for two years would have negatively impacted on Ghana's current account position, external reserves, and consequently the stability of the Cedi.

6. CONCLUSION

Though the Special Chamber did not provide explicit notes on what it meant by **exploration and exploitation** activities, the latter is generally understood to include development drilling. Pending the Court's full ruling in about two years' time, the suspension of NEW exploration activities (licensing, seismic surveys, etc) does not in any way affect all future exploration as the substantive case has not been fully adjudicated upon.

It is unfortunate that Reuters Africa and quick-to-publish media houses in Ghana put out stories that were at variance with the facts of the ruling. These sent wrong signals to the investor community. Had these stories not been corrected they could have had negative effect on Tullow Oil's shares.

Technically, Côte d'Ivoire has won 'Round 1' of this bout given that they had nothing to lose *ex-ante*, whereas Ghana has been forced to curtail parts of its oil exploration activities in the disputed maritime boundary. Though the merits of Côte d'Ivoire's case may not be sustained in the final ruling, Ghana should put in place a contingency plan. There would be significant risks should the substantive case be ruled in favour of Côte d'Ivoire come 2017, as contracts will have to be renegotiated, rights will have to be transferred, investment costs may have to be recovered, projects will have to be delayed and, of course, there will be a host of legal challenges.

Ghana needs to plan against some of these likely events and act strategically within broader national and regional interests.

END NOTES

[1] These are rights of sovereignty over the territorial sea and its subsoil, namely: (1) the right to explore for and exploit the resources of [the] seabed and the subsoil thereof by carrying out seismic studies and drilling, and installing major submarine infrastructures there; (2) the right to exclusive access to confidential information about its natural resources; and (3) the right to select the oil companies to conduct exploration and exploitation operations and freely to determine the terms and conditions in its own best interest and in accordance with its own requirements with respect to oil and the environment.

[2] Paragraph 60 reads “the disputed area lies between the coordinates of the line drawn by Côte d’Ivoire, as described in paragraph 27, and the coordinates of the line which according to Ghana would be the maritime boundary between the two countries, as described in paragraph 29.”

[3] This is the report and information on compliance with any provisional measures prescribed.

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